UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALORICA, INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.,	)	**CASE NO. 18-CA-190846**
AND	)	
OPEIU, LOCAL 153, OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO	)	

ALORICA, INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.,	)	**CASE NOS. 25-CA-185622 and 25-CA-185626**
AND	)	
SETH GOLDSTEIN AND OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 153	)	

RESPONDENT ALORICA, INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.'S MOTION TO FILE SUPPLEMENTAL BRIEF CITING NEW BOARD AUTHORITY

Respondent Alorica, Inc. and its subsidiary/affiliate Expert Global Solutions, Inc., by its counsel of record and pursuant to §102.47 of the NLRB Rules and Regulations, files this motion to file a supplemental brief in support of Exceptions in the above-captioned matter based on the Board's December 14, 2017 decision in *The Boeing Company*, 365 NLRB No. 154 (2017). In support of its motion, Respondent states:

1. On November 15, 2017, Respondent timely filed Exceptions to the ALJ's Decision (issued October 18, 2017) in the above-captioned natter.
2. On November 29, 2017, Counsel for the General Counsel timely filed his Answering Brief to Respondent's Exceptions and Cross-Exceptions to the ALJ's Decision.

Counsel for the Charging Parties did not participate in the hearing before the ALJ and did not file an Answering Brief or Cross-Exceptions to the ALJ's Decision.

3. On December 13, 2017, Respondent timely filed its Answering Brief to Counsel for the General Counsel's Cross-Exceptions and a Reply Brief responding to the Answering Brief of Counsel for the General Counsel.
4. On December 14, 2017, the National Labor Relations Board issued its Decision in *The Boeing Company, supra*, overruling the Board's decision in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004) and creating a new analysis under which employer rules must be evaluated.
5. The sole issue in the above-captioned matter pending before the Board is whether Respondent's Arbitration Agreement violates Section 8(a)(1) of the Act by restricting employee rights to file charges with the NLRB. The ALJ's Decision relies solely on *U-Haul of California*, 347 NLRB 375 (2006), *enforced* 255 Fed. Appx. 527 (D.C. Cir. 2007), which relied upon and applied the *Lutheran Heritage* analysis. Because *Boeing* creates a new test for analyzing employer work rules, Respondent requests the opportunity to present to the Board how *Boeing* affects the outcome of this matter. The Board in *Boeing* specifically instructed that the new analysis should be applied "to this case and all pending cases" meaning that the legal ruling in *Boeing* directly affects the outcome of this case. *Boeing* at 365 NLRB No. 154 at sl.op. 17.
6. Respondent, therefore, requests the Board's permission to supplement its arguments to discuss the impact of *Boeing* on the instant case with the attached Supplemental Brief (Exhibit 1).
7. Neither Counsel for the General Counsel nor Charging Parties (whose counsel has not

participated in these proceedings) is prejudiced by the filing of this motion and supplemental brief because the Board's directive in *Boeing* includes application of the new analysis to pending cases.

8. This motion is filed in good-faith and Respondent will not object to any additional time needed by Counsel for the General Counsel to respond to the supplemental brief.

WHEREFORE, Respondent respectfully requests the Board's permission to file a Supplemental Brief Citing New Authority, a copy of which is attached as Exhibit 1.

DATED this 19th day of December 2017.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

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EXHIBIT 1

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RESPONDENT ALORICA, INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.'S SUPPLEMENTAL BRIEF ANALYZING NEW BOARD AUTHORITY

Introduction

The only issue before the Board in this case is whether Respondent's Agreement to Arbitrate (the "Agreement") is unlawful because it prevents employees from filing unfair labor practice charges. In concluding that the Agreement violates Section 8(a)(1), the ALJ relied exclusively on *U-Haul of California*, 347 NLRB 375 (2004), *enforced*, 255 Fed. Appx. 527 (D.C. Cir. 2007), a case in which the Board applied *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004), to conclude that an arbitration agreement which is silent regarding filing unfair labor practice charges violated the Act simply because an employee might reasonably

construe the agreement to include such a prohibition. Because the recently issued Board Decision in *The Boeing Company*, 365 NLRB No. 154 (December 14, 2017) overrules *Lutheran Heritage*'s "reasonably construe" standard, the Board's application of *Lutheran Heritage* in *U-Haul of California* must be re-examined. Based on the newly articulated *Boeing* test, *U-Haul of California* must be overruled and the Complaint in this case dismissed.

Argument

In *Boeing*, the Board overruled the overbroad "reasonably construe" standard of *Lutheran Heritage* and replaced it with the following:

> In cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would interfere with Section 7 rights, the board will evaluate two things: (i) the nature and extent of the potential impact on NLRB rights, *and* (ii) legitimate justification associated with the requirement(s) [*emphasis original*].

Boeing at sl.op. 14. In explaining how it will apply this new test, the Board recognized there are: "(a) rules that are lawful because when reasonably interpreted they would have no tendency to interfere with Section 7 rights and therefore no balancing of rights and justifications is warranted, and (b) rules that are lawful because, although they do have a reasonable tendency to interfere with Section 7 rights, the Board has determined the risk of such interference is outweighed by the justification associated with the rule." *Boeing* at sl.op. 4. Applying this new test to the pending case, there is no question that the ALJ's conclusion that employees may reasonably construe the Agreement to prevent them from filing unfair labor practice charges must be set aside.

Initially, the Agreement in no way limits the filing of unfair labor practice charges and, therefore, is lawful on its face. Even if the Agreement might have a tendency to interfere with employee rights to file unfair labor practice charges, the risk of this interference is minimal and

outweighed by the efficiencies arbitration provides to resolving workplace issues. Consistent with *Boeing*, therefore, the Board must overturn *U-Haul* and conclude that the Agreement here does not run afoul of the Act by precluding the filing of unfair labor practice charges.

A. The Agreement is Lawful Because It Does Not Prevent Employees from Filing Unfair Labor Practice Charges with the NLRB.

The ALJ Decision, consistent with the argument advanced by Counsel for the General Counsel and pursuant to *U-Haul*, concludes that the Agreement is unlawful on its face because an employee might construe it to prohibit the filing of unfair labor practice charges. In short, the ALJ blindly followed *U-Haul* to conclude that the Agreement's inclusion of "all disputes" being subject to "final and binding arbitration" unlawfully restricted employees from filing unfair labor practice charges. The Agreement, however, makes no mention of unfair labor practice charges, does not preclude activity protected by Section 7, and ends with an "irrevocable waiver" by both the employee and the employer to have disputes "decided in court or by a jury" – an unequivocal reference to court proceedings, not to agency proceedings. Further, there is no evidence in the record that shows that employees understood or construed the Agreement as limiting their right to file unfair labor practice charges and there is no evidence in the record that shows that Respondent used, or intended to use, the Agreement to prevent employees from filing unfair labor practice charges.

Hence, the Agreement does not limit an employee's right to file unfair labor practice charges. A reasonable reading of the Agreement clearly concludes that the intent of the Agreement was to limit court proceedings, not to prevent employees from exercising their Section 7 right to file unfair labor practice charges. There is no balancing of rights needed here.

The Agreement does not have a tendency to interfere with an employee filing unfair labor practice charges. Thus, the overbroad reading of the Agreement required by *U-Haul* now is improper under *Boeing* and, accordingly, the Board should dismiss the Complaint allegations in this case alleging a prohibition on the filing of unfair labor practice charges without further analysis.

B. Even if the Agreement Might Have a Tendency to Infringe on Section 7 Rights, Respondent's Justification for the Agreement Outweighs the Risk of such Tendency.

Even if the Agreement somehow is deemed to have a tendency to deter employees from filing unfair labor practice charges (which it does not), the risk of that construction is minimal and outweighed by Respondent's justification for wanting to resolve employment disputes by arbitration. As argued in Respondent's Memorandum in Support of Exceptions, the Board and federal courts long have accepted arbitration as an efficient means for resolving employment disputes. Respondent's desire to implement an efficient, well-recognized mechanism for resolving employment disputes, therefore, outweighs any *potential* misconstruction of the Agreement by employees to prohibit the filing of unfair labor practice charges. Under the test articulated in *Boeing*, therefore, the Agreement at issue here does not violate the Act as alleged.

Conclusion

For all of the foregoing reasons, Respondent respectfully requests that the Board, applying the newly articulated *Boeing* test, conclude that the Agreement is this case does not violate the Act by preventing employees from filing unfair labor practice charges.

DATED this 19th day of December 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICEI certify that on December 19, 2017, a copy of the foregoing ***RESPONDENT ALORICA INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.'S MOTION TO FILE SUPPLEMENTAL BRIEF CITING NEW BOARD AUTHORITY*** was Electronically Filed as a .pdf document via the NLRB's e-filing system and transmitted via e-mail to the following parties:

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